JD(SF)–23–15
Phoenix, Arizona

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

BROOKDALE SENIOR LIVING, INC.
D/B/A EMERITUS SENIOR LIVING,

and Case 28-CA-134729

MARISOL DOMINGUEZ,
AN INDIVIDUAL

Stefanie J. Parker, Esq., and *Paul R. Irving, Esq.,*
for the General Counsel.
Jeffrey E. Toppel, Esq.
(Jackson Lewis P.C.),
for Respondent.

DECISION

STATEMENT OF THE CASE

Amita Baman Tracy, Administrative Law Judge. This case was tried in Phoenix, Arizona, on March 10, 2015. MariSol Dominguez (the Charging Party) filed the charge on August 14, 2014.[1] The General Counsel issued the complaint on October 31.

The complaint alleges that Brookdale Senior Living, Inc. d/b/a Emeritus Senior Living (Respondent)[2] violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) maintaining overly-broad and discriminatory rules since February 14; (2) issuing a final written warning to the Charging Party on or about July 30; and (3) discharging the Charging Party on or about August 13. Respondent filed a timely answer denying the alleged violations in the complaint.

1 All dates are in 2014 unless otherwise indicated.
2 Respondent is also known as Chris Ridge Senior Living and Christown (Tr. 21, 191).

On the entire record,[3] including my observation of the demeanor of the witnesses,[4] and after considering the briefs filed by the General Counsel and Respondent,[5] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company, operates a nursing home, and provides inpatient medical care and senior living facilities at its office and place of business in Phoenix, Arizona, where it purchased and received goods valued in excess of $50,000 directly from points outside the State of Arizona, and derived gross revenues in excess of $100,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

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3 The transcripts in this case are generally accurate, but I make the following corrections to the record: Transcript (Tr.) 11, Line (L.) 4: "motive stating" should be "motivating;" Tr. 32, L. 9: "of" should be "or;" Tr. 41, L. 17: "car" should be "CAR" which stands for "corrective action required;" Tr. 44, L. 8, L. 11, L. 21; Tr. 172, L. 16, L. 25: "car" should be "CAR;" Tr. 44, L. 25: "card" should be "CAR;" Tr. 127, L. 23, Tr. 140, L. 11: the speaker should be Mr. Toppel, not Ms. Parker.

4 In making my findings regarding the credible evidence, including the credibility of witnesses, I considered the testimonial demeanor of such witnesses, the content of the testimony and the inherent probabilities based on the record as a whole. In certain instances, I may have credited some but not all, of what the witnesses said. "Nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds, 340 U.S. 474 (951). See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939–940 (2007). This is particularly the case where the credited portions of the witness' testimony are "consistent with the testimony of credited witnesses or with documentary evidence," constitute an admission against interest, or are relied upon by the party against which a particular issue is being resolved. *Upper Great Lakes Pilots*, 311 NLRB 131, fn. 2 (1993). In addition, I have carefully considered the testimony in contradiction to my factual findings, but I have discredited such testimony, either as having been in conflict with credited documentary or testimonial evidence, or because it was in and of itself incredible and untrustworthy.

5 Other abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based on my review and consideration of the entire record.

II. Alleged Unfair Labor Practices

A. Respondent's Operations

Respondent operates a nursing facility in Phoenix, Arizona. The nursing facility consists of independent living, assisted living, and skilled nursing (Tr. 21). Respondent admits, and I find, that the following individual is a supervisor within the meaning of Section 2(11) of the Act and an agent within the meaning of Section 2(13) of the Act: Wilton Syckes, Jr. (Syckes), Respondent's executive director (GC Exh. 1(c), 1(d)).

Syckes began working at Respondent in early November 2013 (Tr. 23, 141)[6]. As executive director, Syckes oversees the day-to-day operations of Respondent including disciplinary actions taken against its employees (Tr. 21, 145). Syckes testified that the "fundamental, most important thing you do" at the Facility is maintaining census (defined by Syckes as the number of people living in the beds in the skilled nursing care operation) (Tr. 148). Syckes supervises 10 to 15 employees directly, and indirectly supervises 130 other employees (Tr. 146). Syckes' direct involvement in disciplinary actions varied depending on whether he directly supervised the employees, and if there was any disagreement on the disciplinary action issued by a supervisor (Tr. 146).

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6 Overall, I do not find Syckes to be a particularly credible witness. As a result, I have generally credited his testimony only where it constitutes an admission against interest, or is consistent with documentary evidence or the testimony of more credible witnesses. Throughout his testimony, he provided vague responses and could not recall many details of the facts underlying his discipline and termination of Dominguez. A large majority of his testimony consisted of statements such as, "I can't recall," and "It's quite possible." For example, Syckes adamantly testified that he investigated the alleged infractions Dominguez committed before disciplining her (Tr. 28), but also admitted that it was possible Dominguez could have been performing her hospital visitation responsibilities and not actually tardy for work, one of the alleged infractions she committed (Tr. 29). Later, when asked again, he testified that he essentially did not need to investigate her infractions because she failed to timely provide him the daily marketing reports (Tr. 65, 180). Asked a third time, Syckes stated that prior to issuing Dominguez's termination, he discussed his decision with other management officials via email; however, despite the General Counsel's subpoena request (GC Exh. 11), he failed to produce any of these emails (Tr. 65). He also could not recall whether he discussed Dominguez's tardiness with her prior to giving her the tardiness counseling form (Tr. 29). As for other employee's bringing their children to work, Syckes initially could not recall if any other employees brought their children to work but then recalled other employees brought their children to work because they were approved to do so for other reasons (Tr. 29, 174–175). Syckes also did not know which employees reported to him and the job titles of the employees at his own facility, including the title of Janice Ellington; Syckes testified that Dominguez would know better than he the title of Ellington, even though he fired Dominguez 7 months prior to the trial (Tr. 40). These contradictions, as well as others detailed in this decision, lead me to the conclusion that Syckes' testimony was not credible.

B. Respondent's Disciplinary Policies

Respondent's employee handbook, dated February 2009, effective through August 1, provides employees with rules regarding unacceptable conduct including violation of the confidentiality policy:

> All employees must abide by certain rules of conduct based upon honesty, teamwork, good taste, fair play and safety.
>
> […]
>
> While it is impossible to list all types of misconduct, the following are examples of some, but not necessarily all, types of intolerable behavior:
>
> […]
>
> - Unprofessional, disruptive, disrespectful, abusive, rude, aggressive, degrading, or improper behavior directed toward any residents, visitors or co-workers.
>
> […]
>
> - Violation of Confidentiality Policy, including gossiping or exaggerating about a resident or co-worker.

(GC Exh. 5; Tr. 115).[7]

The employee handbook states that violations of the above rules may lead to disciplinary actions up to and including termination. These disciplinary actions include oral or written warnings, suspension with or without pay, demotion, probation, or termination. Management considered violations of the rules on an individual basis.

C. Dominguez's Employment with Respondent

MariSol Dominguez (Dominguez) began working for Respondent in September 2011 (Tr. 73), and held the position of transitional care liaison (TCL) when she was terminated in August 2014 (Tr. 74).[8] As TCL, Dominguez' primary responsibilities included ensuring that the skilled

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7 After Respondent acquired the Facility in August 2014, Respondent issued a new handbook (Tr. 114). However, this new handbook is not relevant to these proceedings.

8 I find the testimony of Dominguez both believable and reliable. Dominguez provided generally credible testimony where she appeared forthright, thoughtful, and steady. Dominguez' testimony has been corroborated by other witnesses. Furthermore, Dominguez has a more

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nursing care floor census was at full capacity (Tr. 75, 151; R. Exh. 4), and visiting various venues during her workday to foster relationships to ensure that Respondent would receive referrals for new patients (Tr. 75). Dominguez' reporting time to work varied, and she did not clock in or clock out (Tr. 74–75, 176).[9] She received a base salary plus bonuses. Dominguez consistently earned bonuses throughout 2014 until her termination (Tr. 185). Dominguez often worked on the skilled nursing care floor (on the second floor) at the Facility, even though her office was on the first floor, because she needed to determine the number of available beds and assist the nursing staff with admissions (Tr. 75–76, 144). When she worked on the weekends, Dominguez covered the admissions office (Tr. 77).

Syckes directly supervised Dominguez from November 2013 until her termination (Tr. 23). As part of her TCL duties, in January, Syckes asked Dominguez to complete daily marketing (or activity) reports (or logs) (Tr. 33, 157–158).[10] These daily marketing reports reflected who Dominguez spoke with on a daily basis in her efforts to obtain referrals to the Facility (Tr. 112). Syckes did not set firm deadlines or due dates for Dominguez to provide him with the daily marketing reports (Tr. 91). Syckes testified that he expected the completed daily marketing reports returned to him on a weekly basis, but he also could not recall what Dominguez and he agreed on as to when she would return these reports (Tr. 159–161, 195). On many occasions from January to May, Dominguez did not provide Syckes with the daily marketing reports as he requested (GC Exh. 2). At times, Syckes reminded Dominguez to provide these daily marketing reports, and on April 10, he noted in an email to Dominguez that providing these reports to him "must not get in the way of building my census" (GC Exh. 2).[11] Eventually, Dominguez provided Syckes with the daily marketing reports, sometimes after the firm deadlines he set for her.[12] Syckes did not warn Dominguez that failure to submit the daily marketing reports could result in discipline including termination until he disciplined her around July 29 (Tr. 38).[13] Furthermore, after May 13, Syckes did not send any more emails to

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distinct recollection of the events in 2014. Dominguez's testimony did not waver during cross-examination. I find it more inherently probable that her recollections are true to the facts. Therefore I find her testimony to be a more reliable version of events.

9 Syckes confirmed that Dominguez' schedule was "pretty much her own" (Tr. 176).

10 Dominguez admitted that she did not agree with the need to provide the reports, and in her opinion, the reports duplicated information found in the Facility's computer system (Tr. 106).

11 Dominguez defined census as the number of patients in the Facility (Tr. 112).

12 These daily marketing reports do indicate the locations Dominguez visited but perhaps did not list "new" referral sources as Syckes testified he needed. Regardless, the record is vague as to whether Dominguez actually obtained "new" referral sources.

13 Syckes testified that he informed Dominguez in writing and verbally that if she did not turn in her reports on a "required basis," he would have to give her some write-ups, although he could not recall when he warned her (Tr. 164, 173). I do not credit Syckes' testimony as I have found his testimony not credible. Furthermore, the written evidence fails to support his testimony that he "wrote it down somewhere" when referring to the hearing exhibits, and failure to submit relevant documents responsive to the General Counsel's subpoena request (Tr. 164).

Dominguez regarding the late daily marketing reports even though she had not turned in the completed reports to Syckes.

On July 5, Dominguez and Sarah Cronk (Cronk), a medicare billing specialist, engaged in an email conversation regarding the billing information on a new patient at Respondent. Cronk asked Dominguez for insurance verification forms. Dominguez, because she was not working that day, asked Cronk to call Janice Ellington-Shicone (Ellington), the admissions coordinator, to get the forms. Cronk responded that she would not call that day but expressed her concerns about obtaining proper authorization for the new patient. In response, Dominguez wrote:

> I would love to hear how Janice throws me under the bus. She is on one along with Bill [Syckes]. He is there today. Better yet…email her. PLEASE! Ms. Perfect doesn't check her email.

Cronk then confirmed that Dominguez wanted her to send an email to Ellington regarding the authorization forms. Dominguez replied that she wanted Cronk to add in her email to Ellington that she

knows Ellington is working that day, and not to copy Syckes on the email (GC Exh. 7).[14]

Dominguez explained that on July 5, although she was not working, Syckes and Ellington emailed her and sent her text messages regarding work. Dominguez felt that the emails and text messages were not professional and rude (Tr. 79). Aside from the July 5 email exchange between Cronk and herself, Dominguez testified she had conversations with Cronk and Melissa Tieman, business office director, regarding Syckes demeaning management style and feeling that he "was always trying to pin something on us" (Tr. 79).

1. Respondent issues Dominguez a final warning on July 29

On July 29, Syckes met with Dominguez to issue her a July 21 dated, final warning, corrective action required (CAR) (hereinafter, "final warning"), due to poor performance.[15] In

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[14] Cronk also testified regarding the events of July 5. I found her to be a credible witness who provided straight forward, uncontradicted testimony. Cronk, who had not met Syckes at the Facility, testified that several time Dominguez and she had discussed Syckes' supervision of Dominguez. Dominguez expressed to Cronk her fear that Syckes was attempting to terminate her employment, and that Ellington tried to do things to get Dominguez fired (Tr. 120, 123). Cronk testified that another employee, Business Manager Melissa Tiemann, also expressed concerns about Syckes' supervision at the Facility (Tr. 121).

[15] Previously, Respondent issued Dominguez warnings on May 12, 2013, and October 24, 2013, for failing to carry out assigned responsibilities and for an inappropriate conversation (R. Exh. 1, 2; GC Exh. 12). The October 24, 2013, final corrective action issued to Dominguez specified her problems with her poor performance including census building, excessive tardiness, failure to complete billing packets, taking an unauthorized 3-hour lunch, failure to develop

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this final warning, Syckes noted 4 specific issues: (1) Dominguez's continued ignorance of his requests and reminders to provide the weekly marketing reports on a weekly basis; (2) Dominguez's production of only one new referral source since November 2013 which is insufficient to maintain continued census or meet goals; (3) Dominguez's inappropriate email conversation on July 5 with an employee about another employee and Syckes—"I would love to hear how Janice throws me under the bus. She is on one along with Bill. He is there today. Better yet…email her. PLEASE! Little Ms. Perfect doesn't check her email"; and (4) Dominguez's tardiness to work on Saturday, June 14 when she arrived at work after 11:15 a.m., and brought her children to work.[16] The issues in this final warning violated rules of conduct in Respondent's workplace including: issues (1) and (2)—insubordination or failure to carry out instructions and failing to carry out assigned responsibility or performing substandard work; issue (3)—violation of confidentiality policy, including gossiping or exaggerating about a resident or co-worker; and issue (4)—children in the workplace where children of employees or other visitors to our employees will not be allowed on the property when the employee is scheduled to work (GC Exh. 3).[17] To correct these issues and violations, Syckes instructed Dominguez to provide these reports on a weekly basis, increase the referral base, "immediately refrain from speaking inappropriately and gossiping about fellow," and abide by the no children in the workplace policy.[18] Finally, the final warning noted that continued behavior in any one of

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relationships with referral sources, and engaging in an inappropriate conversation with a case manager (R. Exh. 2). On November 6, 2013, Nina Louis, executive director, and Roger Call, regional director of operations, reissued essentially the same October 24, 2013 corrective action given to Dominguez because they were unable to find the final form with her signature (Tr. 108). The November 6, 2013 lists the same performance deficiencies but notes it is a "written" corrective action, rather than a "final" corrective action (R. Exh. 3). Dominguez provided a response to each of the performance deficiencies listed, and added, "I feel that now that I have a new ED [Syckes], one that is honest, professional, and takes my position seriously, these problems will no longer be applicable."

Also on October 25, 2013, Respondent issues Dominguez a tardiness counseling form, first offense, for tardiness on 9 occasions (R. Exh. 2).

Because Syckes did not work at the Facility during Dominguez' prior disciplinary actions, he decided to start anew with Dominguez and form his own opinion (Tr. 154–156). However, he also stated that he was at a meeting regarding Dominguez' disciplinary action in November 2013 when he first began, but could not recall the meeting and stated that when he first met Dominguez, she had "no issues" (Tr. 155).

16 Syckes testified that he generally did not work on Saturdays, and did not work on Saturday, June 14 (Tr. 26); he testified vaguely that he knew Dominguez was tardy to work because he called the nursing facility and spoke to several employees (Tr. 26).

17 Syckes testified that other than Dominguez he had not disciplined any other employees for gossiping even though other employees have gossiped at Respondent (Tr. 71).

18 Syckes testified that Dominguez' email concerned him primarily because Ellington became upset by the email (Tr. 170). He further testified that he would have still issued the July 29 final warning to Dominguez even if he was unaware of her email comments regarding Ellington and him (Tr. 171).

the 4 items would result in progressive discipline "up to and including termination of employment" (GC Exh. 3).

Dominguez took the final warning home, and returned it on July 30.[19] In response, Dominguez wrote that she felt Syckes was trying to set her up but that regardless of her personal feelings, she would provide the reports "from here on out." Dominguez further stated that she felt that other reports would reflect more accurately the referrals she obtained for Respondent.[20] In addition, she wrote, "I understand and take responsibility for the words I spoke in my email. I honestly don't feel as though they should be considered gossiping though. I do know that there is a problem here at CRV [Respondent] with employees speaking ill of each other and I personally think that it is somewhat encouraged by the ED [Executive Director Syckes]. During our meeting [on July 29 when Syckes gave her the final warning], I did voice that everyone should be spoken to about gossiping if he is bringing it up with me and was told it would be handled on a case to case basis. I will submit a list of times I know certain people have 'gossiped' about me so that they can be dealt with as well."[21] Finally, Dominguez stated that she would never have her children visit Respondent (GC Exh. 3).[22]

2. Respondent issues Dominguez a tardiness counseling form

Also on or about July 31, Syckes issued Dominguez a tardiness counseling form, first offense, which indicated that she had been tardy on the Saturdays of June 14, July 12 and 26.[23]

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19 Syckes testified that he "possibly" asked the business office manager if he could terminate Dominguez for not responding to the July 21 final warning the following day (Tr. 200). Syckes' credibility on this portion of his testimony is further diminished by his response: "Do I recall saying that, no. If I did say that and *was overheard saying that*, then I would have to say I said it" (emphasis added) (Tr. 200).

20 Dominguez testified that her referral sources had been sufficient to meet goals and maintain census (Tr. 83).

21 Syckes stated at the July 29 meeting between Dominguez and himself that the third issue in the final warning concerned only Dominguez and "specifically about her emails mentioning Janice and me" (GC Exh. 3).

22 Dominguez testified that other employees including Ellington bring their children to Respondent, and testified that she had brought her children to Respondent prior to this date and had never been disciplined or warned (Tr. 85). David Frazier, a current employee at Respondent, credibly testified that other employees including Ellington brought their children to work at least on 2 occasions (Tr. 130). Syckes testified that he had given Ellington permission once to bring her children to work, and that a former business manager also brought her children to work but that her relative at the facility babysat the children (Tr. 174–175).

23 Syckes testified he did not work on Saturday, July 12 or 26, and could not recall how he knew Dominguez was tardy to work on those dates, but stated he investigated the Charging Party's alleged tardiness because "he would not have put this on here if it was not true" (Tr. 27–28). He later admitted that he essentially did not need to investigate Dominguez' infractions because she did not submit the daily marketing reports timely (Tr. 64).

Again, Dominguez disagreed with the tardiness counseling, stating that her job duties require her to stop at hospitals which she does on her way to work on the weekends (GC Exh. 3). Syckes also admitted that Dominguez could have been visiting other facilities rather than actually being tardy (Tr. 29).

3. Respondent terminates Dominguez' employment on August 13

On Wednesday, August 13, Syckes terminated Dominguez' employment. Syckes indicated 2 issues which led to Dominguez' termination. First, Dominguez failed to provide the daily marketing reports by Tuesday, August 12.[24] Second, Respondent scheduled Dominguez to work on August 9, and although she arrived on time to work, she could not be found or was out of the facility for several hours, and she did not answer her office or cell phone.[25] Syckes stated that Dominguez failed to carry out her assigned responsibilities or performed substandard work (GC Exh. 4). Syckes testified that the failure to provide the daily marketing reports was the reason for Dominguez' termination, and to disregard the second reason listed for termination (Tr. 43, 180).

Dominguez testified that she told Syckes she planned to give him the marketing report that day, and that she felt that the reports were not late since Syckes had not given her a firm deadline (Tr. 90, 198). As for August 9, Dominguez stated that after she came into work at the admissions office, she worked on the second floor of the facility and spoke to several employees (Tr. 92).[26]

4. Respondent's disciplinary actions against other employees

In July 2014, Respondent sought to terminate certified nursing assistant Maria Estrada (Estrada) for poor job performance, substandard care, violation of code of conduct, and not

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24 Dominguez testified that she told Syckes she planned to give him the marketing report that day (Tr. 90). Furthermore, the termination form indicates that Dominguez received her final warning on July 21 when she actually received the final warning on July 29.

25 Respondent submitted a note from an employee named Danielle, dated August 9, which stated that Dominguez came to work on time, but was unavailable for several hours of the day and did not forward her office phone to her cell phone (R. Exh. 5).

26 Frazier testified uncontroverted that Dominguez came to work that day, asking him how many beds were available for patients, and volunteered to get lunch for the employees which was her common practice (Tr. 132). Despite the admitted fact that Frazier also is in a relationship with Dominguez, as a current employee, his testimony is compelling since he is testifying against the interests of his current employer. Under Board law, current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests. *Advocate South Suburban Hospital*, 345 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully).

following Respondent's family values. Prior to her termination, Respondent issued Estrada 6 corrective actions. Before Estrada's termination was approved, Respondent's human resources director, Andrea McDade (McDade) asked several follow-up questions regarding the circumstances surrounding the proposed termination. Once these questions were answered satisfactorily, McDade approved Estrada's termination (GC Exh. 6).

Respondent also issued a final reminder corrective action in December 2014 to a concierge/receptionist for divulging personal information of a deceased patient (GC Exh. 8).

Respondent's tardiness policy indicates that an employee will receive a written counseling session and warning for 3 tardies in a 90-day period. That employee will receive another written counseling and warning for a fourth tardy in the same 90-day period. Finally, that employee will be terminated for a fifth tardy in the same 90-day period (GC Exh. 9). Disciplinary records show several employees tardy and unauthorized absences on multiple occasions receiving tardiness counseling forms (GC Exh. 9). Per its tardiness policy, Respondent terminated employee, Charon Johnson, in February for her third tardiness offense in a 90-day period. However, employee David Frazier, who had been issued many tardiness counseling forms, remains employed by Respondent (GC Exh. 10).

III. Discussion and Analysis

A. Unacceptable Conduct and the Confidentiality Policy

The complaint alleges at paragraph 4(b) that since February 14, Respondent has maintained two overly broad and discriminatory rules which violate Section 8(a)(1) of the Act. Specifically, the complaint alleges that the following rules are overly broad and discriminatory:

> While it is impossible to list all types of misconduct, the following are examples of some, but not necessarily all, types of intolerable behavior:
>
> (1) Unprofessional, disruptive, disrespectful, abusive, rude, aggressive, degrading, or improper behavior directed toward any residents, visitors or co-workers.
>
> (2) Violation of Confidentiality Policy, including gossiping or exaggerating about a resident or co-worker.

(GC Exh. 5; Tr. 115). The first rule concerns "unacceptable conduct" in the workplace, and the second rule concerns the "confidentiality policy" in the workplace.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999).

If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to protected, concerted activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. A rule does not violate the Act if a reasonable employee merely could conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee would read the rules as prohibiting Section 7 activity. Id. Stated another way, the relevant inquiry under Section 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999). The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage Village-Livonia*, supra at 647; *Lafayette Park Hotel*, supra at 828. Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage Village-Livonia*, supra at 646.

For the reasons that follow, I find that the "unacceptable conduct" rule violates Section 8(a)(1) of the Act but that the "confidentiality policy" rule does not violate Section 8(a)(1) of the Act.

Turning first to the unacceptable conduct rule, the General Counsel argues that the "unacceptable conduct" rule is "ambiguous" in that it fails to define and provide guidance on the conduct that is objectionable to Respondent (GC Br. at 11). Respondent argues that the General Counsel failed to present any evidence to satisfy its burden (R. Br at 27).

Respondent's "unacceptable conduct" rule does not explicitly restrict Section 7 activity. Moreover, there is no evidence that the rule was promulgated in response to protected, concerted activity or was applied to restrict the exercise of Section 7 rights. Accordingly, the only question is whether Respondent's employees would reasonably construe the unacceptable conduct rule to prohibit Section 7 activity.

Generally, Section 7 protects employees' right to engage in workplace discussions with their co-workers about unions, working conditions and management. This right covers "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). Thus, employer prohibition on "negative" or "inappropriate" discussions among its employees without further clarification would cause a reasonable employee to read the rule as prohibiting Section 7 activity. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (2014); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. 1 (2014).

Respondent's rule prohibiting unprofessional, disruptive, disrespectful, abusive, rude, aggressive, degrading, or improper behavior directed toward any residents, visitors or co-workers falls within this category of an overbroad rule prohibiting protected discussions with co-workers. In *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012),[27] cited by the General Counsel, the Board determined that employees would reasonably construe the rules' broad prohibition against "disrespectful" conduct as encompassing Section 7 activity, such as employees' protected statements to co-workers, supervisors, managers, or third parties. Similarly, regarding Respondent's "unacceptable conduct" rule, an employee would reasonably construe the prohibition against "disrespectful," "rude," and "degrading" conduct toward any co-worker as including protected discussions with co-workers. For example, employee solicitation of union support from other employees is protected activity under the Act, and employees would reasonably believe that Respondent's prohibition against "disrespectful" conduct towards co-workers precludes such activity. Certainly, Respondent is permitted to maintain order in its workplace and promote harmonious relations among its employees, visitors, and residents. However, Respondent fails to define what "unprofessional, disruptive, disrespectful, abusive, rude, aggressive, degrading, or improper" means, and thus the terms are subjective. Furthermore, Respondent fails to provide any examples or clarifications as to what these terms mean, and provides no limiting terms. See also *Community Hospitals of Central California*, 335 NLRB No. 87, slip op. at 4 (2001) (rule prohibiting disrespectful conduct toward others overly broad, in part, because it included no limiting language which removes its ambiguity and limits its broad scope). Furthermore, ambiguities in a rule are construed against the promulgator of the rule. Thus, Respondent's "unacceptable conduct" policy is unlawful on its face, under Section 8(a)(1) of the Act.

Now turning to the "confidentiality policy," the General Counsel argues that the rule is "substantially identical" to the unlawful rule in *Hills & Dales General Hospital*, supra, rather than the rule found lawful in *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011). (GC Br. at 11). Respondent argues that the Board has found lawful a similar rule in *Lytton Rancheria of California*, 361 NLRB No. 148 (2014).

Respondent's "confidentiality policy" rule does not explicitly restrict Section 7 activity. Moreover, there is no evidence that the rule was promulgated in response to protected, concerted activity. Accordingly, the question remains as to whether Respondent's employees would reasonably construe the "confidentiality policy" rule to prohibit Section 7 activity.

Respondent's rule regarding its "confidentiality policy" is akin to an employer no-gossip policy rather than a policy specifically restricting employees' discussions of the terms and conditions of their employment such as wages, hours, and workplace complaints. Here, Respondent precludes employees from gossiping or exaggerating about a co-worker or resident.

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[27] Although the decision issued in *Karl Knauz Motor, Inc.*, has no precedential value due to its invalidation by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), I find that legal analysis to be persuasive and have accordingly adopted the rationale here.

Gossip is commonly defined as chatty talk or rumors or reports of an intimate nature. *Hyundai America Shipping Agency*, supra, slip op. at 3.

I disagree with the General Counsel that Respondent's "confidentiality policy" is similar to the unlawful rule in *Hills & Dales General Hospital*, and find that the "confidentiality policy" is similar to the lawful rule in *Hyundai America Shipping Agency* and *Lytton Rancheria of California*. In *Hills & Dales General Hospital*, the Board found unlawful a rule stating that employees "will not engage in or listen to negativity or gossip." Supra, slip op at 1. The Board agreed with the administrative law judge that the prohibitions on "negativity" are unlawful. Id. Furthermore, the General Counsel in *Hills & Dales General Hospital* did not allege the prohibition on gossip in that rule to be unlawful, thus, the Board did not address the "gossip" portion of the rule. Therefore, the unlawful rule in *Hills & Dales General Hospital* is not analogous to Respondent's "confidentiality policy" rule.

In contrast, Respondent's rule is analogous to lawful rules in both *Hyundai America Shipping Agency* and *Lytton Rancheria of California*. In *Hyundai America Shipping Agency*, the Board found lawful a rule prohibiting harmful gossip." 357 NLRB No. 80, slip op. at 3. As in Respondent's "confidentiality policy," the "harmful gossip" rule in *Hyundai America Shipping Agency* does not mention managers and merely prohibits gossip. Id. In *Lytton Rancheria of California*, the Board, citing the similar lawful rule in *Hyundai America Shipping Agency,* found lawful a rule prohibiting gossip about other team member including management. 361 NLRB No. 148, slip op. at 2–3. Here, Respondent's "confidentiality policy" is similar to the lawful rule in *Lytton Rancheria of California*. I find that employees of Respondent would not reasonably construe the rule against "gossiping or exaggerating about a resident or co-worker" to prohibit Section 7 activity. Therefore, I do not find Respondent's "confidentiality policy" rule to violate Section 8(a)(1) of the Act.

B. Respondent Unlawfully Disciplines Dominguez with the Final Written Warning

The complaint alleges at paragraph 4(c) that on July 30, 2014, Respondent issued Dominguez a final written warning due to her violation of the unlawful rules in paragraph 4(b) of the complaint and her protected, concerted activity since July 2014. By this conduct, the complaint alleges that Respondent violated section 8(a)(1) of the Act.

An employee's discipline including discharge independently violates Section 8(a)(1) of the Act when it is motivated by employee activity protected by Section 7. *Lou's Transport*, 361 NLRB No. 158, slip op. at 2 (2014). Under *Wright Line*, to prove an adverse action violates Section 8(a)(1), the General Counsel must establish, by preponderant evidence , that: (1) the employee engaged in concerted activity, (2) the employer knew about the concerted activity, and (3) the employer had animus toward the activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Meyers Industries*, 268 NLRB 493, 497 (1984); *Grand Canyon University*, 359 NLRB No. 164 (2013). If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected

conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980). See also *Signature Flight Support,* 333 NLRB 1250 (2001) (applying *Wright Line* in context of discharge for protected, concerted activity).

The employer cannot meet its burden by merely showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3–4 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation* Services, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (203); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Absent a showing of antiunion, or anti-Section 7 activity, an employer may discharge an employee for a good reason, a bad reason or no reason at all without running afoul of the labor laws. See *Clothing Workers v. NLRB (AMF, Inc.)*, 564 F.2d 434, 440 (D.C. Cir. 1977).

Indeed, it has long been recognized that where an employer's reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 70 (9th Cir. 1966). Furthermore, a trier of fact may not only reject a witness' story, but also find that the truth is the opposite of that story. *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. 11–12 (2014).

Applying the above principles to the facts here, the evidence established that Dominguez was engaged in protected, concerted activity with the meaning of Section 7 of the Act when she emailed Cronk on July 5. Dominguez email exchange had been preceded by several conversations with her co-workers regarding Sykes' management style which they felt was demeaning, and her concerns about her job security and their working conditions. Concerted activity directed toward supervisory conduct, such as "rude, belligerent, and overbearing behavior" which directly affects the employees' work, constitutes protected activity under the Act. *Arrow Electric Co.*, 323 NLRB 968, 970 (1997), enfd, 155 F.3d 762 (6th Cir. 1998). The Board has also stated that employee conversations about job security are "inherently concerted." *Food Services of America,* 360 NLRB No. 123, slip op. at 3 (2014).

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887. An individual employee's complaint is concerted if it is a "logical outgrowth of the concerns of the group." *Every Woman's Place*, 282 NLRB 413 (1986); *Mike Yurosek & Son, Inc.*, 306 NLRB

1037, 1038 (1992), after remand, 310 NLRB 831 (1993), enfd., 53 F.3d 261 (9th Cir. 1995). In certain circumstances, the Board had found that "ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees." *Anco Insulations, Inc.*, 247 NLRB 612 (1980). Conversely, concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen & Apprentices of the Pipefitting Industry of the United States & Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment.

Respondent argues that Dominguez' email conversation does not constitute protected, concerted activity, and that even if Dominguez' actions were found to be protected, concerted activity, Respondent was unaware of her actions and did not have animus towards it (R. Br. at 13-17). I disagree. As set forth clearly in this decision, Sykes was not a credible witness, and I reject his testimony that Dominguez' "gossiping" email did not ultimately factor into his decision to discipline, and ultimately terminate her. Dominguez complained to her co-workers about her own job security, and the credited evidence also shows that Dominguez and at least one other employee discussed Sykes' management style. Dominguez wanted Cronk to check on a work matter she was convinced Sykes would use to threaten her employment status at Respondent. Thus, in this case, I find that Dominguez's actions were protected and concerted.

Furthermore, although Dominguez and her co-workers did not specifically bring their concerns to Respondent, Sykes became aware of Dominguez' protected, concerted activity when he was informed of the email conversation.[28] In fact, Sykes disciplined Dominguez for her "gossiping" with a co-worker about another co-worker. With respect to the third prong under *Wright Line*, I conclude that the evidence strongly supports an inference that Respondent became hostile to Dominguez when she "gossiped" about Sykes. Even though Respondent's "confidentiality policy" rule does not mention "gossiping" about a supervisor as grounds for discipline, nevertheless, Sykes disciplined Dominguez for "gossiping" about him. This action alone demonstrate Sykes' animus towards Dominguez for "gossiping" about him to other employees. Sykes' contemporaneous notes from his meeting with Dominguez regarding the final warning belie his testimony that he actually disciplined Dominguez for gossiping and upsetting a co-worker, and he was not concerned that he was mentioned in Dominguez' email. In addition, records produced by the General Counsel show that other employees of Respondent were not treated so harshly for similar behavior. For example,

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[28] The Board has also made clear that employee discussions with co-workers are indispensible initial steps along the way to possible group action and are protected regardless of whether the employees have raised their concerns with management or talked about working together to address those concerns. *Hispanics United of Buffalo,* 359 NLRB No. 37, slip op. at 3 (2012), citing *Relco Locomotives,* 358 NLRB No. 37, slip op. at 17 (2012), affd. and incorporated by reference at 361 NLRB No. 96 (2014).

Respondent issued many corrective actions to employees for tardiness, and only terminated one other employee for poor performance after she had been issued 6 corrective actions and investigated the proposed termination before finalizing it. Evidence of disparate treatment supports a finding of animus. *Camaco Lorain Mfg. Plant,* 356 NLRB No. 143, slip op. at 5 (2011). Thus, the General Counsel has met its initial burden.

Having concluded that the General Counsel satisfied her initial burden under *Wright Line*, the burden shifts to Respondent to prove, as an affirmative defense, that it would have disciplined Dominguez in the absence of her protected, concerted activity. This burden may not be satisfied by reasons that are pretextual, i.e. false reasons or reasons not in fact relied upon for the discharge. Instead, the Board has held that a finding of pretext defeats an employer's attempt to meet its rebuttal burden. *Stevens Creek Chrysler Jeep Dodge,* 357 NLRB No. 57, slip op at 7 (2011), enfd. sub nom. *Matthew Enterprise v. NLRB,* 498 Fed. Appx. 45 (D.C. Cir. 2012). The Board relies on both circumstantial and direct evidence in determining whether the conduct in question was unlawfully motivated. *Fluor Daniel, Inc.*, 311 NLRB 498 (1993). Improper motivation may be inferred from several factors, including pretextual and shifting reasons given for an employee's adverse action including discharge, the timing between the employee's protected activity and the adverse action, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), aff'd mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

I do not find that Respondent has carried its rebuttal burden in this case. Respondent argues, in its defense, that it had a legitimate business reason for her discipline (R. Br. at 18–21). However, I have found that Respondent's timing of the disciplinary action against Dominguez strongly suggest that it was due to Dominguez' "gossiping" email. I have further found that Dominguez was treated more harshly than Respondent's other employees. Therefore, as discussed further, I find that Respondent's proffered reason for discharging Dominguez was pretextual, and that Respondent has failed to satisfy its *Wright Line* burden.

I find that Dominguez' "gossiping" about Syckes was a motivating factor in its decision to discipline her. Respondent's other basis for discipline are pretextual. The timing of the final warning is most suspicious and provides clear evidence of animus towards Dominguez. Soon after the "gossiping" email of July 5, Syckes sought to discipline Dominguez with a July 21 dated final warning. Thus, only after Dominguez engaged in protected, concerted activity did Respondent decide to discipline her.

As for the first issue in the final warning, Dominguez, admittedly, had been inconsistent in providing Syckes with the daily marketing reports. Sometimes he would remind her to turn in the daily marketing reports, and other times she would remind him that she had not returned the reports. Both Dominguez and Syckes testified that they had not established a set day of the week in which the daily marketing reports needed to be returned. Syckes also reminded Dominguez that making sure the Facility was at full census was her priority. Furthermore, Syckes unbelievably claims that he had warned Dominguez that he would be forced to

discipline her if she did not turn in the forms consistently. However, the evidence does not support this testimony. Syckes did not send a single email to Dominguez after May 13 requesting her to submit the daily marketing reports. Nor did Syckes send Dominguez an email from this time period warning her of the consequences of not turning in the daily marketing reports. Syckes claims that when he presented Dominguez with the final warning, she stated she knew she would be receiving a CAR. It is possible though that even if this statement were true, Dominguez had suspected that Syckes was trying to "pin" something on her as she discussed with co-workers.

As for the second issue in the final warning, Respondent claims Dominguez produced only one referral source since November 2013. However, Respondent failed to produce evidence to show that Dominguez had produced only one referral source. As for the fourth issue, Syckes testified that Dominguez did not have a set schedule, and he was not certain whether she was actually tardy. Although Dominguez testified that her children admittedly had come to work that day, at least one other employee had brought her children to work without being disciplined.

Respondent also failed to adequately investigate Dominguez' alleged violations before issuing the final warning. Syckes provided inconsistent testimony regarding his investigation. Syckes testified he did not need to investigate the allegations but also testified that he had investigated the alleged violations and consulted with other management officials before disciplining Dominguez. Again, the evidence does not support these shifting statements.

Respondent may have had a legitimate reason for disciplining Dominguez because she had failed to submit her daily marketing reports on a consistent basis. However, Syckes tolerated these performance deficiencies for at least 6 months without once warning Dominguez. Only after Dominguez spoke poorly about Syckes did he decide to discipline her. Thus, under the Act, given the General Counsel's showing of unlawful motive, Respondent's affirmative defenses are insufficient. See *Bruce Packing Co.,* 357 NLRB No. 93, slip op. at 3–4 (2011). Instead, Respondent was required to show that it would have actually disciplined Dominguez absent her protected, concerted activity. As Respondent has failed to do so, I find that Dominguez' discipline violated Section 8(a)(1) of the Act.

C. Respondent Unlawfully Discharges Dominguez

The complaint also alleges at paragraph 4(d) that on August 13, Respondent terminated Dominguez due to her protected, concerted activity since July 2014 and due to her violation of the unlawful rules in paragraph 4(b) of the complaint. By this conduct, the complaint alleges that Respondent violated section 8(a)(1) of the Act. The same *Wright Line* analysis applied to the final warning applies to these allegations.

In this instance, I find that Dominguez' email exchange with Cronk regarding Ellington and Syckes was both protected and concerted. Furthermore, Syckes became aware of the email exchange, and decided to issue Dominguez a final warning which I have found was unlawful due to Dominguez' protected, concerted activity. Although Dominguez' "gossip" email was not

specifically referenced in the termination, without the final warning, Dominguez' termination would not have occurred. Thus, Dominguez' protected, concerted activity was a motivating factor in the issuance of the termination notice. In addition, Dominguez' written rebuttal to her final warning shows that she continued voicing her disagreement with Sykes' management style at the Facility. Dominguez wrote, "I do know that there is a problem here at CRV [Respondent] with employees speaking ill of each other and I personally think that it is somewhat encouraged by the ED [Executive Director Sykes]. During our meeting [on July 29 when Sykes gave her the final warning], I did voice that everyone should be spoken to about gossiping if he is bringing it up with me and was told it would be handled on a case to case basis. I will submit a list of times I know certain people have 'gossiped' about me so that they can be dealt with as well." Furthermore, only 13 days after issuing her the final warning, Respondent terminated Dominguez under suspicious circumstances. Dominguez' discharge indicated two bases: failure to turn in the completed weekly report, and an absence from the workplace on August 9.

Again, the burden shifts to Respondent to prove, as an affirmative defense, that it would have disciplined Dominguez in the absence of her protected, concerted activity. Respondent argues that it would have terminated Dominguez based on her unprotected conduct on or about August 13 (R. Br. at 21–25). At the hearing, however, Respondent advanced reasons for its discharge of Dominguez which were not included in Dominguez's discharge paperwork. Sykes testified that he terminated her only for failing to provide the daily marketing reports, and that he did not terminate her for her alleged absence on August 9 (Tr. 179). Respondent's shifting justification for its termination of Dominguez provides evidence of its unlawful motive. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB,* 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action).

Respondent's disciplinary records also show that other employees were treated more favorably than Dominguez. Although no other employee had been disciplined or discharged for failing to provide the daily marketing reports, only one other employee had been discharged for poor performance but the employee received six warnings before she was terminated. All other employees committed violations which resulted in warnings, but not termination. In contrast, Dominguez was discharged less than two weeks after her first warning from Sykes. While it is true that Respondent issued Dominguez disciplinary actions in the past and Dominguez did not provide the daily marketing reports on a weekly basis at times, the record shows that Respondent tolerated that behavior. Furthermore, Syckes testified that he did not consider her prior discipline. I find Respondent failed to present sufficient evidence to meet its burden.

In contrast, the evidence shows that Respondent's discharge of Dominguez constituted disparate treatment and its asserted reasons for Dominguez's discharge is a pretext. Respondent terminated Dominguez for failing to submit the weekly marketing reports after she received her final warning. However, the evidence shows a true question as to when the report was actually

due to Sykes. Sykes admitted that there had been no firm deadline throughout the time he requested Dominguez complete the reports.

Finally, Respondent failed to investigate the alleged violations committed by Dominguez. Instead, Syckes relied upon hearsay evidence to support the allegation against Dominguez. When confronted with the possibility that Dominguez was not absent on August 9, Syckes retracted this allegation in the termination but testified that he would have still terminated Dominguez. This inadequate investigation also shows pretext by Respondent.

Overall, Respondent failed to establish that it would have terminated Dominguez absent her protected, concerted activity. For all the above reasons, I conclude Respondent's asserted reasons for discharging Dominguez are pretext. Thus, Dominguez' termination violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad and discriminatory rule that prohibits unacceptable conduct in the workplace.

3. Respondent violated Section 8(a)(1) of the Act when it issued a final warning on July 29 to Dominguez.

4. Respondent violated Section 8(a)(1) of the Act when it terminated Dominguez on August 13.

5. By engaging in the unlawful conduct set forth above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and Section 2(2), (6) and (7) of the Act.

6. Respondent did not violate Section 8(a)(1) by maintaining its "confidentiality policy" rule.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having maintained an overly broad and discriminatory work place rule prohibiting unacceptable conduct in the workplace, dated February 2009, effective through August 1, Respondent shall rescind or revise this rule in the employee handbook. Respondent

shall furnish, publish and/or distribute to all current and former employees who worked for Respondent from the period of February 2009 to August 2014, the revised or rescinded rule in the employee handbook. Respondent shall notify those employees that the unlawful rule has been revised and/or rescinded.

Respondent, having discriminatorily disciplined and discharged employee MariSol Dominguez, must offer her full reinstatement to her former position or, if her position no longer exists, to substantially equivalent position, without prejudice to her seniority or any other right or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). In addition, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

I also order Respondent to remove from its files the unlawful July 21 final warning issued to MariSol Dominguez, as well as any reference to the unlawful July 21 final warning of MariSol Dominguez, and to notify the employee in writing that this has been done and that the unlawful July 21 final warning will not be used against her in any way.

The General Counsel requests a nationwide notice posting (GC Br. at 18). I do not recommend such a remedy as it is too broad based on the evidence before me. The complaint alleges that Respondent, which is identified as Brookdale Senior Living, Inc. d/b/a Emeritus Senior Living, "has been a corporation with an office and place of business in Phoenix, Arizona (Respondent's facility)"and has maintained overbroad rules that violated Section 8(a)(1) (GC Ex. 1(c)). The General Counsel did not provide any evidence regarding the implementation and maintenance of this same employee handbook at other locations of Respondent other than submitting the employee handbook, which appears not to be applicable in California (GC Ex. 5). Due to the absence of this evidence, I decline to recommend a nationwide remedy. *Boch Imports, Inc. d/b/a Boch Honda*, 362 NLRB No. 83, slip op. at 3-4) (2015), citing *Jack in the Box Distribution Center Systems*, 339 NLRB 40 (2003) (finding that appropriate notice posting remedy is one that is "coextensive with the [r]espondent's application of its handbook"); *Marriott Corp.*, 313 NLRB 896 (1994) (in the absence of evidence that unlawful rule was maintained at respondent's other locations, remedial order was limited to the "location at which a violation was alleged and litigated").

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, Brookdale Senior Living, Inc. d/b/a Emeritus Senior Living, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule in the employee handbook which prohibits employees from engaging in unprofessional, disruptive, disrespectful, abusive, rude, aggressive, degrading, or improper behavior directed toward any residents, visitors, or co-workers.

(b) Disciplining and discharging or otherwise discriminating against any employee for engaging in protected, concerted activity and/or for violating an unlawful rule.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, revise or rescind the rule found to be unlawful as set forth above.

(b) Within 14 days of the date of the Board's Order, offer MariSol Dominguez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make MariSol Dominguez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(d) Compensate MariSol Dominguez for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

calendar quarters.

(e) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful discipline and unlawful discharge of MariSol Dominguez, and notify her in writing that this has been done and that the discipline and discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, the attached notice marked "Appendix"[30] on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

30 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 2, 2015

Amita Baman Tracy
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discipline, discharge, or otherwise discriminate against you for engaging in protected, concerted activities protected under Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT maintain a rule in the employee handbook prohibiting employees from engaging in unprofessional, disruptive, disrespectful, abusive, rude, aggressive, degrading, or improper behavior directed toward any residents, visitors, or co-workers.

WE WILL, within 14 days from the date of this Order, offer MariSol Dominguez full reinstatement to her former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make MariSol Dominguez whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate MariSol Dominguez for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful discipline and unlawful discharge of MariSol Dominguez, and notify her in writing that this has been done and that the discipline and discharge will not be used against her in any way.

WE WILL revise or rescind the unlawful rule in our employee handbook, and WE WILL advise in writing our current and former employees from the period of February 2009 to August 2014 that we have done so and that the unlawful rule will no longer be enforced.

BROOKDALE SENIOR LIVING, INC.
D/B/A EMERITUS SENIOR LIVING

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1400, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-134729 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.